83-769

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN BELMONT AND
PHILLIP CHARLES BERNSTENE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does Title 18, U.S.C., Section 2314 a felony, apply to sales of unauthorized sales of video tape cassettes of copyrighted motion pictures in view of the Copyright Act of 1976 which by it's terms addresses the issue of criminal copyright violation in terms of a misdeamor?

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions

Statutory Provisions

INDEX TO APPENDIX

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OPINION BELOW

The opinion of the Court of Appeals Below (Appendix B, infra, page 20) is reported in 715 F.2d, 459. The opinion of the District Court Below (Appendix A, infra, page 1) was not reported.

JURISDICTION

The Judgment of the Court Below (Appendix A, infra, page 20) was entered on September 7, 1983. Rehearing was not sought. The jurisdiction of this Court is invoked under 28, U.S.C., Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment, United States Constitution which provides: "No person . . . be deprived of life, liberty, or property, without due process of law. . .".

2. The statutes under which

petitions were prosecuted though nothing turns on its terms, is as follows:

Title 18, U.S.C., Section 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each sahll be fined not more than $10,000 or imprisoned not more than five years, or both. . .".

-and-

Title 18, U.S.C, Section 2314:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of value of $5,000 or more, knowing the same to have been stolen, converted

or taken by fraud; . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

STATEMENT OF THE CASE

A.) COURSE OF PROCEEDINGS:

On October 12, 1982, Petitioners BELMONT and BERNSTENE in a cause then pending in the United States District Court for the Central District of California, was found guilty by a judge sitting without a try of inter alia conspiracy to violate the Interstate Stolen Property Act (Title 18, U.S.C., Section 2314) by transporting or causing to be transported, "pirated" video cassettes having an aggregate value in excess of Five Thousand Dollars ($5,000).

Upon it's finding of guilt as to Count One of the Indictment, each of the Petitioners was sentenced

to three (3) years, with the condition that they each serve three (3) months in a jail-type institution, with the execution of sentence as to the remainder of the sentence suspended, and each was placed on three (3) years' probation upon terms and conditions imposed by the Court. This Judgment and sentence was affirmed by the Court of Appeals for the Ninth Circuit on September 7, 1983. (715 F.2d 459).

B.) EXISTENCE OF JURISDICTION BELOW

Petitioners were convicted in the District Court for the Central District of California for, inter alia conspiracy to violate the Interstate Stolen Property Act (18, U.S.C., Section 2314) by transporting or causing to be transported in interstate commerce "pirated" video cassettes having an aggregate value in excess of Five

Thousand Dollars ($5,000).

Petitioners were also convicted on Count Four of Willful Infringement of Motion pictures copyrights, 17 U.S.C., Section 506(A). That conviction, which provided for only a fine as to each Petitioner is not addressed or questioned by this Petition for Certiorari.

The Court of Appeals has decided a Federal question and rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter. (C.A. 5 in U.S.A. vs. Smith, 686, F.2d. 234 (1982)).

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Fifth Circuit in the case of United States vs. Smith, 686 F.2d. 234(1982) held that in dealing with the applicability of the national

Stolen Property Act (Title 18, U.S.C., Section 2314) to Criminal Copyright Infringement, that the Congress had intended that Section 506(A) of the Copyright Act of 1976 to be the exclusive jurisdictional basis for willful violation for commercial advantage of an infringement of a motion picture.

The Smith Court stated it's conclusion at Page 244 where it held:

". . . the language of Section 2314, when read in it's general or common sense, precludes this Court's finding that the particular activity of defendant Smith implicated the felony provisions of Section 2314 to so hold, would seriously encroach upon Congress' lawmaking perogative."

The Ninth Circuit in the case at bar took notice of the Smith decision and the rationale supporting it, and chose to disagree and did

so in the following language, at pages 25 and 26 of Appendix B.

"The Court of Appeals in United States vs. Smith, 686 F.2d at pages 244-249, inclusive, has set forth the applicable legislative history to support the proposition that the Copyright Act of 1976 was intended to be the sole statute establishing criminal sanctions for willful infringement for commercial advantage of an an infringement of a motion picture.

The enactment of the Copyright Actof 1976 Section 506(A) provides two classifications of criminal sanctions for willful violation for commercial advantage or private financial gain.

(i) As to infringement generally, Congress had established a fine of Ten Thousand Dollars ($10,000) and/or one year imprisonment.

(ii) As to infringement of either a copyright in sound recording or a copyright in a motion picture film, Congress had escalated the criminal penalties to Twenty-Five Thousand Dollars ($25,000) for the first offense, and Fifty Thousand Dollars ($50,000) and/or two (2) years imprisonment for the second offense.

If Congress intended that the National Stolen Property Act, Section 2314 could and would apply to willful infringement for commercial advantage or private financial gain, why differentiate in the criminal sanctions imposed under the 1976 Act.

Any doubt as to the applicability of the Copyright Act of 1976 as the exclusive statutory vehicle for "piracy" is resolved by legislative History of the "Piracy and Counterfeiting Amendment Act of 1982", which dealt

with the Congressional intent to strengthen the existing laws "against record, tape and film piracy..."

Title 18, U.S.C., Section 2319 was enacted into law in 1982 and provides for increased penalties for the willful infringement for commercial advantage or private financial gain of inter alia motion pictures, as follows:

(i) As to reproduction or distribution in a one hundred eighty (180) day period of at least sixty-five (65) infringing copies, the criminal penalty is a maximum find of Two Hundred Fifty Thousand Dollars ($250,000) and/or imprisonment for five (5) years, or both.

(ii) As to criminal infringement of more than seven (7) but less than sixty-five (65) copies, the penalty maximum would be Two Hundred Fifty Thousand Dollars ($250,000)

and/or two (2) years imprisonment.

(iii) As to any other criminal copyright infringement, the penalty is not more than Twenty-Five Thousand Dollars ($25,000) and/or imprisonment for not more than one (1) year.

A review of the Legislative History, the Smith case cited supra, and the application of logic would make clear the legislative intent was to punish willful violation of copyright laws for commercial advantage or private gain exclusively under said copyright laws and not under the National Stolen Property Act Section 2314.

Accordingly, the conviction under Count I should be reversed.

CONCLUSION

The Judgment of the Ninth Circuit Below is in direct conflict

with the decision of the Court of Appeals for the Fifth Circuit and, in the opinion of counsel, is in conflict with the Congressional Legislative Mandate to deal with criminal copyright infringement. (Title 17, U.S.C., Section 506(A) and Title 18, U.S.C., Section 2319). As such, the jurisdiction of this Court is sought to review the conflict between the circuits and as well, to construe the Congressional intent in it's enactment of Title 17, Section 506(A) and Title 18, U.S.C., Section 2319. This Petition for Certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX A

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. PHILLIP CHARLES BERNSTENE, et al., Defendants.	NO. CR 81-623-RJK MEMORANDUM OF DECISION AND ORDER

On August 5, 1981, this case was submitted to the Court by all parties on stipulated facts, including a document entitled "Stipulation of Facts" and an annexed document of 1135 pages consisting of transcripts of telephone conversations and facts related in F.B.I. reports. 1/ Pursuant to this stipulation, the parties agreed that the defendants Phillip Charles Bernstene, John Belmont, Russell Hampshire and Walter Gernert would be tried before the Court on Counts One and Four of the Indictment and that the government would

dismiss the remaining counts against the defendants. (Stipulation of Facts, p. 13; see also Government's June 4, 1982 Response to Court Order ("Government's Response"), p. 3). Count One alleges that the defendants conspired, pursuant to 18 U.S.C. §371, to violate 18 U.S.C. §2314 (interstate transportation of stolen propperty). Count Four alleges that the defendants violated 17 U.S.C. §506(a) (copyright violation).

As a threshold matter, the Court will rule on various evidentiary motions made by defendants. Defendant Belmont's objection to the "third party declarations" as hearsay is OVERRULED. Defendant Belmont's reassertion of his motion, previously denied by this court, to suppress the evidence seized pursuant to search warrant is again DENIED. Defendant Belmont's objection to certain wiretaps on the ground that the government has offered no proof

as to whether the person named "J" or "Jay" is the same person as defendant Belmont is OVERRULED. The Court finds that Special Agent Patrick J. Livingston had sufficient familiarity with defendant Belmont's voice to satisfy the identification requirement of Fed. R.Evid. 901. Defendant Bernstene's objection to the following evidence in the Stipulation of Facts, page 5, line 28, page 6, lines 1 through 4; and page 7, lines 18 through 20 as irrelevant and more prejudicial that probative is SUSTAINED. The Court will not consider the above-listed evidence in trying this case. Defendant Bernstene's objection to any evidence which does not bear on his case and is offered solely to prove the culpability of the other defendants is SUSTAINED. The Court will not consider evidence offered solely to prove the culpability of the other defendants in determining Bernstene's guilt or inno-

cence. Defendant Bernstene's objection to the Stipulation of Facts, page 3, lines 7 through 9 as hearsay is OVERRULED.

1. Count One - The Conspiracy Charge

Count One charges the defendants with conspiring to transport in interstate commerce stolen video tape recordings of copyrighted motion pictures reproduced and sold without the consent of the copyright owners, having a value in excess of five thousand dollars ($5,000.00), knowing the same to be stolen, in violation of 18 U.S.C. §§2314 and 371.

The Court finds that the evidence of the commission of the crime of conspiracy is overwhelming as to each of the four defendants. In addition, the evidence shows a single overall conspiracy. Under these circumstances, the value of each illegal shipment of video tapes may be aggregated to reach the jurisdictional amount of $5,000. Schaffer v. United States, 362

U.S. 511, 517 (1960); United States v. Drebin, 557 F.2d 1316, 1328 (9th Cir. 1977). The evidence shows that there were seven shipments sent in interstate commerce, the value of which totalled $22,600.

The defendants object to the admission of the statements of co-conspirators prior to a finding of the existence of a conspiracy and of the connection of each of the defendants with the conspiracy. Statements made by one co-conspirator during the course of and in furtherance of a conspiracy are admissible as vicarious admissions against another co-conspirator. Fed.R.Evid. 801(d)(2)(E). It is required, however, that there be evidence, independent of the co-conspirator's statements, establishing the existence of the conspiracy and connecting the defendant with the conspiracy. United States v. Batimana, 623 F.2d 1366, 1368-69 (9th Cir. 1980).

Defendants' contention that the evi-

dence must be admitted in a certain order is without merit. The Ninth Circuit rule regarding the admission of such co-conspirator statements is that the order of proof is whooly within the discretion of the District Court. United States v. Sandoval-Villalvazo, 620 F.2d 744, 747 (9th Cir. 1980).

The Court finds that there is ample independent evidence of the existence of the conspiracy by reason of admissions by each defendant as to their criminal activities and their familiarity with the details of the conspiratorial purpose.

The Court also finds that each defendant was fully aware of and voluntarily participated in the conspiracy to sell pirated video tapes. Defendants contend that the evidence does not establish the connection of each defendant with the conspiracy. Evidence of even a slight connection is sufficient to convict the de-

fendants of knowing participation in the conspiracy. United States v. Dunn, 564 F.2d 348, 357 (9th Cir. 1977). The Court will examine the sufficiency of the connecting evidence presented as to each of the defendants.

As to defendant Bernstene, there is clear proof of his connection with the conspiracy since he was the main actor with whom Special Agent Livingston negotiated all his orders of pirated tape cassettes.

Defendant Gernert contends that the evidence fails to demonstrate that he knew that illicit copies of major motion pictures were being shipped. Instead, Gernert, argues, the evidence shows that he was involved in the distribution of pornographic films during the pendency of the conspiracy. However, the stipulated facts show that Gernert not only knew that illicit copies were being shipped, but also

that he himself participated in illegally procuring and duplicating Disney films.

Defendant Hampshire contends that the stipulated facts do not establish that he was a member of the conspiracy to transport stolen video tapes in interstate commerce. Hampshire argues that the stipulated facts establish that he was an employee of Discount Distributors (defendant Bernstene's business) and not that the had knowledge that the tapes were pirated. The main thrust of Hampshire's argument is that he was an outsider to the in-circle which consisted of defendants Bernstene, Belmont and Gernert. Hampshire points out that Bernstene never referred to Hampshire as "part of his team"; that Gernert was unhappy with Hampshire for not giving an accurate count of sales and for alienating defendant Belmont; and that Belmont stated that he thought Hampshire was responsible for telling others that

Bernstene was pirating tapes and not to let Hampshire listen to anything because he was a threat to them.

Hampshire's outsider argument is unpersuasive in light of the clear evidence linking him to the conspiracy. The evidence against Hampshire shows that Hampshire was present at the January 23, 1979 meeting between Bernstene, Gernert, Agent Livingston, Agent Ellavsky and others at which the discussion focused on methods of illegal duplication of video tape cassettes of major motion pictures to obtain a quality result and that Hampshire engaged in phone conversations with Agent Livingston in which Hampshire informed Agent Livingston that certain shipments of pirated tapes had been sent to Agent Livingston in Florida.

Hampshire contends that his participation in the January 23, 1979 meeting was limited to serving hot water for coffee

to the other "actual participants." Hampshire urges the Court to conclude that since his only statement was "[h]ere's the hot water," he was not one of the "actual participants." However, the fact that he may not have been one of the more active participants in the discussion is not determinative of the question of his connection to the conspiracy. Moreover, even assuming that the evidence of his attendance at the January 23, 1979 meeting by itself would not have been sufficient to connect him with the conspiracy, the August 2, 1979 phone conversation between Hampshire and Agent Livingston in conjunction with Hampshire's presence at the January 23, 1979 meeting establishes beyond a reasonable doubt that Hampshire had the requisite connection with the conspiracy. In the August 2, 1979 conversation, Hampshire stated that he had shipped out the tapes Agent Livingston had previously

ordered. Hampshire contends that the proper interpretation of this conversation is that the goods were shipped "as a favor to Bernstene" in a pre-addressed container. Hampshire contends that the fact that he did not know how many cassettes were shipped shows that he was not a conspirator because a conspirator would know exactly how many cassettes were shipped since his share would be based on the profit per cassette. Hampshire also contends that although he knew the identity of "Rocky Two," there is no evidence presented that he knew that the rest of the cassettes shipped were also pirated: Hampshire contends that they might have been blank or pornographic. This argument is unpersuasive. In his August 2, 1979 phone conversation with Agent Livingston, Hampshire demonstrated extensive knowledge of the contents of the shipment. He indicated that he had checked the quality of the

tapes and he assured Agent Livingston that the quality was good. He gave Agent Livingston information regarding various minute details of the shipment such as that it was "all shrunk-wrapped" and that the film "Rocky Two" was substituted in the shipment for another film.

The Court concludes that the evidence establishes beyond a reasonable doubt that Hampshire was connected with, and was a knowing participant of, the conspiracy.

Defendant Belmont's link with the conspiracy is also established by the stipulated facts. Belmont's first appearance in this scenario was apparently in October, 1979. However, a conspirator need not participate in all activities of the conspiracy or become a member of the conspiracy at its inception. United States v. Hicke , 360 F.2d 127 (7th Cir. 1966). It is simply necessary that he knowingly contribute his efforts to further it.

The stipulated facts in this case show that Belmont knowingly contributed his efforts to further the conspiracy. He was introduced by Bernstene to buyers such as Agent Livingston as Bernstene's "source" for major motion pictures and did not attempt to contradict Bernstene. Belmont admitted that he provided Bernstene with copies of the movin "Grease" and with VHS "Animal House." It was Belmont who took it upon himself to warn Bernstene that Hampshire was responsible for leaks regarding Bernstene's illicit business. The Court finds that Belmont was clearly Bernstene's supplier of illicit copies and one of the inner circle in Bernstene's operation. Accordingly, the Court finds defendants Bernstene, Gernert, Hampshire and Belmont guilty as to Count One.

2. Count Four - The Copyright Infringement Charge

Count Four charges the defendants

with criminal copyright infringement of major motion pictures in violation of 17 U.S.C. §506(a).

Defendant Bernstene contends that the government has failed to prove the absence of a "first sale." It is well settled in the Ninth Circuit that the government must prove, as one of the elements in a criminal prosecution for copyright infringement, the absence of a first sale as to those copyrighted articles that the defendant is charged with infringing. See U.S. v. Atherton, 561 F.2d 747, 749 (9th Cir. 1977); U.S. v. Wise, 550 F.2d 1180, 1190 (9th Cir.), cert. denied, 434 U.S. 929 (1977).

The first sale doctrine provides that where a copyright owner parts title to a particular copy of his copyrighted work, he divests himself of his exclusive right to vend that particular copy. Wise, supra, at 1187. Although the owner's other copy-

right rights (reprinting or copying, etc.) remain intact, the exclusive right to vend the transferred copy rests with the vendee. United States v. Drebin, 557 F.2d 1316 (9th Cir.), cert. denied, 436 U.S. 904 (1978).

Absence of a first sale can be proved in two ways. First, the government can offer proof negating the possibility of a first sale by showing that no copies of the work have ever been sold or that any copies sold were never resold to defendant. U.S. v. Atherton, 561 F.2d at 750. Second, the government can show that the tape in question was unauthorized. United States v. Moore, 604 F.2d 1228, 2132 (9th Cir. 1979). In Moore, the Ninth Circuit held that "evidence suggesting that the tapes had an illegitimate origin negates the possibility of a valid first sale as much as proof from tracing the distribution of the tape to its original source." Id.,

at 1232-1233.

The Court finds that the evidence amply establishes the illegitimate origin or the tapes and the absence of a first sale. The stipulated facts show that representatives from each of the copyright owners of the pirated movies would testify that none of the defendants had authority to duplicate or sell copies of these films and that the films had not been subject to a first sale. Defendant Bernstene offers no proof controverting this evidence. Moreover, the following evidence establishes the illicit origin of the tapes:

(1) the fact that these major motion pictures were being sold for only $55 to $65 per movie;

(2) the recorded conversations in which the defendants discuss with Agents Livingston and Ellavsky the various methods of duplicating video tape cassettes

of major movies to produce quality results;

(3) the fact that Agent Livingston asked defendant Bernstene to send the tapes via Amerford instead of UPS; and

(4) the fact that Bernstene told Agent Livingston that the next shipment of cassettes were being shipped with a false address and name because the F.B.I. had come to interview Bernstene.

The Court finds that the stipulated facts establish the absence of a first sale and, accordingly, finds defendants Bernstene, Gernert, Hampshire and Belmont guilty as to Count Four.

3. Defendant Bernstene's Entrapment Defense

Defendant Bernstene contends that he was entrapped because he was induced by Agent Livingston to engage in this crimi-

nal activity. However, it is abundantly clear from the evidence that Bernstene had at the outset, and continued to have throughout the conspiracy, a predisposition to commit the violations of law which are involved here. The evidence shows that Bernstene was generally engaged in the pirated tape industry and was not simply supplying pirated tapes to accommodate the federal agents. The stipulated facts demonstrate that Livingston merely acted convincingly in his role as a customer. The government's action thus constituted nothing more than the affording to the defendant of an opportunity to consummate his illegal plan.

Accordingly, the Court finds defendants Bernstene, Gernert, Hampshire and Belmont guilty as to Counts One and Four.

It is ORDERED that judgment be entered as to defendants Bernstene, Gernert, Hampshire and Belmont in accordance with

the findings herein set forth and in accordance with this Order of the Court.

The Clerk shall send, by United States mail, a copy of this Memorandum of Decision and Order to counsel for the parties.

DATED: October 12, 1983.

/s/
ROBERT J. KELLEHER
United States
District Judge

FOOTNOTE:

1/Although the "Stipulation of Facts" was not signed by defendant Bernstene (but only by defendants Belmont, Hampshire and Gernert), the Court deems it to apply to defendant Bernstene pursuant to the government's representation on p. 3, lines 7-19 of its Response to the Court's March 29, 1982 Order for further briefing.

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. JOHN BELMONT, Appellant.	No. 82-1730 D.C. No. CR 81-00623-02
UNITED STATES OF AMERICA, Appellee, v. PHILIP CHARLES BERNSTENE, Appellant.	No. 82-1732 D.C. No. CR 81-00623-01
UNITED STATES OF AMERICA, Appellee, v. RUSSELL HAMPSHIRE, Appellant.	No. 82-1733 D.C. No. CR 81-00623-03

UNITED STATES OF AMERICA, Appellee, v. WALTER GERNERT, Appellant.	No. 83-1734 D.C. No. CR 81-00623-05 O P I N I O N

Appeal from the United States District Court for the Central District of California
Honorable Robert J. Kelleher, Presiding
Argued and submitted August 2, 1983

Before: CHOY, GOODWIN and ANDERSON, Circuit Judges

GOODWIN, Circuit Judge

After a bench trial on stipulated facts, John Belmont, Phillip Bernstene, Russell Hampshire and Walter Gernert were convicted of conspiring to commit an offense against the United STates, 18 U.S.C. §371, (transportation of stolen goods in interstate commerce, 18 U.S.C. §506(a). The charges grew out of sales of videotape cassettes of copyrighted motion pictures.

In this consolidated appeal all appellants argue that the government failed

to establish the absence of a "first sale," a necessary element of copyright infringement, and that traffic in unauthorized cassettes cannot for the basis of a conviction under 18 U.S.C. §2314.

Bernstene argues that his conviction cannot stand because he was entrapped.

Hampshire and Gernert argue that the government failed to establish the $5,000 jurisdictional minimum of §2314 and that under a strick constructio of the stipulation the district court should have convicted them on the misdemeanor copyright count only and not on the felony charge. Hampshire also argues that the evidence was insufficient to establish that he was part of the conspiracy. We affirm.

As part of an undercover operation, FBI agents Patrick Livingston and Bruce Ellavasky established Gold Coast Specialties, Inc. in 1977 and pretended to be interested in purchasing pirated motion

pictures. The agents primarily dealt with Bernstene, who until 1979 operated Discount Distributors with Gernert and Hampshire. In 1979, Bernstene left Discount Distributors to join TVX Distributors. Gernert and Hampshire established Video Club of America. Belmont was Bernstene's source of motion pictures. The agents bought 442 video cassettes through Discount Distributors and TVX on three separate occasions in February, May and October 1979.

The principal issue in this appeal is whether 18 U.S.C. §2314 applies to the kind of theft involved in this case. It is a federal felony to transport "in interstate or foreign commerce any goods, wares [or] merchandise . . . of the value of $5,000 or more, knowing the same to have been stolen, converted, or taken by fraud . . . ." Relying on United States v. Smith, 686 F.2d 234 (5th Cir. 1982),

appellants argue that transportation of unauthorized copies is not an offense under §2314. They contend that copyrights are not "goods, wares or merchandise" nor can they be "stolen, converted or taken by fraud" within the meaning of the statute. This argument, however, is foreclosed by Ninth Circuit law, which appellants neither cite nor discuss.

In United States v. Drebin, 557 F.2d 1316, 1332 (9th Cir. 1977), reh'g deni d, 572 F.2d 215, cert. denied, 436 U.S. 904 (1978) defendants were convicted under both 18 U.S.C. §2314 and 17 U.S.C. §506(a) of crimes involving the wrongful appropriation of motion pictures. Drebin held that copies are goods or merchandise and that illicit copying is theft within the meaning of the statute. Accord United States v. Berkwitt, 619 F.2d 649, 656-58 (7th Cir. 1980) (by implication); United States v. Whetzel, 589 F.2d 707, 710 n.10

(D.C. Cir. 1978); United States v. Atherton, 561 F.2d 747, 752 (9th Cir. 1977); United States v. Sam Goody, Inc., 506 F. Supp. 380, 387091 (E.D. N.Y. 1981).

We recognize that in Drebin the original copyrighted works were in fact stolen whereas here most of the copying was "off the air" with no proof of interstate transportation of stolen originals. The distinction between "off the air" copying and stealing of original copyrighted works was the basis upon which the Smith court distinguished Drebin. Smith, 686 F.2d at 243 n.17. We do not find the distinction meaningful in terms of the purpose of the statute. The evil which Congress addressed in the National Stolen Property Act was the interstate traffic in stolen property. The rights of copyright owners in their protected property are just as deserving of protection from interstate transportation as are the ownership

interests of those who own other types of property.[1/] When society creates new kinds of property and thieves devise new ways of appropriating that property to their own use, the law against transporting property expands with the growth in the varieties of property. There is no utility in the sort of sterile formality urged upon us by these defendants. A large percentage of the world supply of entertainment property is generated within this circuit. If, indeed, the Fifth Circuit takes a different view of the matter, we are not bound to follow it.

We also recognize that after Drebin was decided Congress enacted new copyright legislation that increases the penalties for copyright infringement.[1/] Appellants argue that this action evidences congressional intent or understanding that the §2314 does not reach copyright infringement.

The argument is unpersuasive. Congress' concern about criminal copyright violations contains no evidence of intend to limit the scope of §2314. Rather, the new Piracy Act evidences the contrary intent: "Whoever violates section 506(a) . . . shall be punished as provided in subsection (b) of this section and such penalties shall be in addition to any other provisions of title 17 or any other law." (18 U.S.C. §2319(a).[1/] It is also a cardinal principle of construction that repeals by implication are not favored. "When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal 'must be clear and manifest.'" United States v. Borden Co., 308 U.S. 188, 198-99 (1939) (quoting Red Rock v. Henry, 106 U.S. 596, 601-2 (1883)).

In view of the clear intent of Con-

gress to treat the wrongful copying of sound and video tapes and motion picture materials as a species of theft, it is only logical to hold that the interstate transportation of the stolen copies is a violation of §2314.

None of the other issues in the case justifies extended comment. The government proved by abundant circumstantial evidence that the tapes had an illegitimate origin. The government's case sufficiently demonstrated the absence of a first sale. United States v. Moore, 604 F.2d 1228, 1232-33 (9th Cir. 1979).

Bernstene was not entrapped. The government proved that he was predisposed to commit the crime. See United States v. Shapiro, 669 F.2d 593, 597 (9th Cir. 1982).

Because there was only one overall conspiracy, the district court properly aggregated the value of all shipments in

determining whether the jurisdictional amount required by §2314 had been satisfied. See Schaffer v. United States, 362 U.S. 511, 517 (1960). The amount of the sales far exceeded the $5,000 limit, and the sale price is valid evidence of the value. Even after deducting the cost to the thieves of any blank tapes that they purchased, the added value of the tapes which resulted from the piracy exceeded the limit.

Evidence of at least a slight connection of Hampshire to the conspiracy was sufficient to make him liable. See United States v. Dunn, 564 F.2d 348, 356-57 (9th Cir. 1977).

Finally, Hampshire and Gernert's argument that under the stipulation the district could should have convicted them on the misdemeanor copyright count only and not on the felony §2314 charge is frivolous. The stipulation is not ambigu-

ous; it allows the district court to convict on both counts or on only one count.

The judgments are affirmed.

FOOTNOTES

United States v. Belmont, et al.

Nos. 82-1730, 82-1732, 82-1733, 82-1734

1/Cf. United States v. Greenwald, 479 F.2d 320, 322 (6th Cir.) (theft of chemical formulations within the National Stolen Property Act), cert. denied, 414 U.S. 854 (1973); United States v. Seagraves, 265 F.2d 876, 880 (3d Cir. 1959) (the phrase "goods, wares, merchandise" in 18 U.S.C. §2314 comprehends all personal property that is "ordinarily a subject of commerce").

2/After Drebin was decided, the new Copyright Act of 1976 came into effect, Pub. L. No. 94-553, 90 Stat. 2541 (effective Jan. 1, 1978) and Congress enacted the Piracy and Counterfeiting Amendments

Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 (amending 17 U.S.C. §506(a), 18 U.S.C. §2318 and adding 18 U.S.C. §2319).

3/The Senate Judiciary Committee specifically added the italicized language quoted in the text to make clear that the Piracy Act "supplement[s] existing remedies contained in the copyright law or any other law." S. Rep. No. 274, 97th Cong., 2nd Sess. 2, reprinted in 1982 U.S. Code Cong. & Ad. News 127, 128.

No. 83-769

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN BELMONT AND PHILLIP CHARLES BERNSTENE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether transportation of videotape cassettes of pirated motion pictures may form the basis for a charge of interstate transportation of stolen property in violation of 18 U.S.C. 2314.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Statutes and rule:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-769

JOHN BELMONT AND PHILLIP CHARLES BERNSTENE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B2) is reported at 715 F.2d 459. The memorandum decision of the district court (Pet. App. A1-A19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1983. The petition for a writ of certiorari was filed on November 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on a stipulated record in the United States District Court for the Central District of California,[1] petitioners were convicted of conspiring to transport stolen goods in interstate commerce, in violation of 18 U.S.C. 371 and 2314 (Count One), and willfully infringing copyrights of motion pictures, in violation of 17 U.S.C. (1976 ed.) 506(a) (Count Four) (ER 1230-1231).[2] Each petitioner was sentenced to three years' imprisonment on Count One; those terms were suspended in favor of terms of three months' confinement followed by three years' probation. Petitioners Belmont and Bernstene were fined $2,500 and $5,000 respectively and were placed on three-year concurrent terms of probation on Count Four. ER 1230, 1231.[3]

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[1]The stipulated record before the district court included the following: Stipulation of Facts as supplemented (ER 1176-1191); transcripts of conversations and meetings between FBI agents and petitioners and their co-conspirators, recorded by the agents; transcripts of court-ordered wiretaps installed at TVX Distributors, which recorded conversations between the conspirators, and FBI summaries of these conversations (ER 1-1135). "ER" refers to the Excerpt of Record filed in the court of appeals.

Petitioners and others were indicted by a federal grand jury sitting in the Southern District of Florida. On the motion of petitioners and co-defendants Russell Hampshire and Walter Gernert under Fed. R. Crim. P. 21(b), venue of their cases was transferred to the Central District of California.

[2]Pursuant to the stipulation of the parties (Pet. App. A1-A2), the government moved for dismissal of Counts Two, Three, and Five at sentencing, and that motion was granted (ER 1243, Docket No. 136; ER 1249, Docket No. 136). Petitioners do not challenge their convictions on Count Four (see Pet. 6).

[3]Co-defendants Hampshire and Gernert were convicted on Counts One and Four. Hampshire was fined $2,500 on Count One and sentenced to two concurrent three-year terms of probation on Counts One and Four (ER 1258). Gernert was fined a total of $35,000 on Counts One and Four and sentenced to a one-year term of imprisonment on

1. During the summer of 1977, the FBI established in Miami an undercover investigation into the national pornography industry. As part of this investigation, FBI agents Patrick Livingston and Bruce Ellavsky, posing as businessmen operating "Gold Coast Specialties, Inc.," purchased sexually explicit materials from various sources and pretended to distribute it. When the agents discovered in late 1978 that some of the sources were selling pirated motion pictures, as well as pornography, they feigned interest in purchasing such pirated material.

On November 6, 1978, petitioner Bernstene telephoned Livingston in Miami and advised that he and others were operating under the name Discount Distributors and were selling videotape cassettes of X-rated hard core pornographic films, as well as cassettes of major motion pictures (ER 1). In three subsequent recorded telephone conversations, Bernstene discussed with Livingston the possible purchase of videotape cassettes of major motion pictures (ER 3, 14, 28). Bernstene stated that he had at least ten video cassettes of motion pictures and mentioned titles including *Heaven Can Wait, Lawrence of Arabia, Saturday Night Fever*, and *Gone With The Wind* (ER 5, 7). Bernstene indicated that Al Nunes in Hawaii and co-defendant Bernie Avers were his sources of pirated movies (ER 7, 29, 36, 37-38).

On January 23, 1979, the agents met with petitioner Bernstene and other conspirators at the offices of Discount Distributors, where the agents were shown a copy of *The Enforcer* on a videotape machine (ER 52, 145-148, 190).

Count Four; that term was suspended in favor of ten days' confinement and three years' probation (ER 1251). Co-defendants Timothy Burns, Bernard Avers, Edward Smoliak, and Gary Smoliak pleaded guilty to one count of copyright infringement, in violation of 17 U.S.C. (1976 ed.) 506(a); in addition, the Smoliaks each pleaded guilty to one count of conspiracy to transport videotape cassettes of pirated motion pictures in interstate commerce, in violation of 18 U.S.C. 371 and 2314.

During the meeting, petitioner Bernstene stated that he was still receiving "masters" from Al Nunes as a commission for putting Livingston in contact with Nunes (ER 70-72). In addition, Bernstene said he intended to visit a potential source "in the valley," a collector who had a large library of motion pictures (ER 57-58, 65, 68-69, 70). Co-conspirator Bernard Avers stated that he, too, had provided masters of current motion pictures and could supply others, including *Star Wars, Superman*, and several Walt Disney titles (ER 148-149, 166, 176, 182).

On February 6, 1979, Agent Livingston placed an order with petitioner Bernstene for 142 videotape cassettes of 11 motion pictures. They agreed on a total purchase price of $7,100, and Bernstene directed that the check be made payable to Discount Distributors. ER 204, 220-223. The videotape cassettes filling that order were shipped by Discount Distributors or TVX Distributors in Los Angeles and were received by Gold Coast Specialties over a three-month period (ER 247-248, 258, 294-295, 336-338). The agents later learned that Bernstene was planning to leave Discount Distributors in order to join TVX Distributors (ER 284-285, 287).

On May 31, 1979, Livingston and petitioner Bernstene met in a Marina del Rey hotel room, where Livingston negotiated a second order of 150 cassettes of ten motion pictures, including *China Syndrome, Manhattan*, and *Grease* (ER 339-341, 343, 380-383, 385-386). During this meeting, Bernstene stated that someone from a studio was a new source for motion picture masters (ER 350). In two subsequent telephone conversations, Bernstene indicated that he had another operation in Minneapolis that was making duplicates for him and that Livingston would receive some shipments from that source (ER 428, 440, 441-442). On July 17, 1979, Livingston picked up a shipment of 19 videotape cassettes of *The Exorcist* and *Grease*

sent to Gold Coast from Minneapolis Audio. A handwritten note stating "From Chuck Bernstene" was on the packing list in code. ER 488. On September 7, 1979, Bernstene gave Livingston a tour of the TVX Distributors offices, including the "duping" room, which contained 44 machines used for reproducing videotape cassettes (ER 591).

On October 13, 1979, Livingston and Bernstene began negotiating their final transaction. They initially agreed that Livingston would pay $6,400 in two installments for 120 cassettes. ER 615, 620-621. At an October 29, 1979, meeting in Las Vegas, the order was revised upward to include more cassettes for a total of $7,500 (ER 713-714, 726, 728). During that meeting, Livingston wrote a check for $3,750, half of the total cost, and Bernstene delivered to Livingston a package containing 15 cassettes of the movie *The Onion Field* (ER 714, 715, 727, 728).

On January 8, 1980, Livingston finally met petitioner Belmont, whose role in the scheme he had discovered in October 1979, when court-ordered wiretaps first intercepted Belmont's conversations and references to him[4] (ER 868, 871). When Belmont arrived at the meeting, Bernstene introduced him as his "source" of major motion pictures (ER 871). Belmont stated that he had acquired a good master of the movie *Star Trek* and that he could supply Livingston with cassettes of the movie within a few days. Belmont indicated that he had several "sources" of motion pictures and that one was an individual who delivered movies to theaters in the Los Angeles area. ER 876.

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[4]During an October 25, 1979, conversation with co-defendant Gernert, Bernstene stated that the two would have to go over their books of account carefully to determine what Gernert owed Bernstene because co-defendant Hampshire had not been careful about what stock received from "J" (petitioner Belmont) should be credited to Bernstene or to others; Gernert was sure Belmont had been paid in full, but thought he owed Bernstene about $9,000 (ER 660, 667-671). In a later

On February 14, 1980, Belmont was arrested at his place of business (ER 1118). A search of the premises, pursuant to a warrant, revealed a set-up of 18 recorders connected so that an operator could reproduce simultaneously 16 videotape cassettes from a "master" cassette (ER 1115). Agents seized over 30 video cassette recorders, over 85 cassettes of 50 motion pictures, invoices from TVX Distributors, and three books on copyrights (ER 1119-1133).

2. On appeal, petitioners challenged their convictions on the ground, inter alia, that transportation of unauthorized videotape cassettes of copyrighted movies does not constitute an offense under 18 U.S.C. 2314.[5] Relying on its own prior decision in a similar case of movie piracy, *United States* v. *Drebin*, 557 F.2d 1316, 1332 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978), the court of appeals rejected petitioners' contention (Pet. App. B4-B9). The court declined to follow *United States* v. *Smith*, 686 F.2d 234 (1982), in which the Fifth Circuit refused to apply 18 U.S.C.

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telephone conversation, Bernstene confirmed that Belmont supplied him with 15 cassettes of *Grease* (ER 678). On November 2, 1979, Bernstene conferred with Gernert about a dispute that had arisen between Gernert and Belmont over work assignments (ER 746-748), and later that day Gernert said he would make the cassettes of the "Disney things" and that Bernstene should not have "J" do them (ER 751-752). On November 7, 1979, Gernert and Belmont discussed comparing two "master" tapes of *The Muppets* to decide which should be used for making cassettes (ER 785-787). On November 8, 1979, when Belmont called Bernstene's office, he told the receptionist that henceforth he would use the name JoJo as a "precaution" (ER 791-792). During this call, Belmont told Bernstene that he thought Hampshire was the source of the "talking in your place" and that Bernstene should not let Hampshire listen to anything "[b]ecause he is a danger for you" (ER 793).

[5]The court of appeals also rejected petitioner Bernstene's claim that he was entrapped (Pet. App. B9) and the contention of both petitioners that the government had failed to show the absence of a first sale (*ibid.*). These issues are not raised in the petition.

2314 to transportation of videotape cassettes in a case in which the original copying was "off the air" (Pet. App. B6-B7). The court of appeals concluded that the evil at which Section 2314 is aimed is interstate traffic in stolen property and that the "rights of copyright owners in their protected property are just as deserving of protection from interstate transportation as are the ownership interests of those who own other types of property" (Pet. App. B6-B7). The court also concluded that the legislative history of the Copyright Act of 1976, 17 U.S.C. (& 1976 ed.) 101 *et seq.*, and its amendments did not evidence any intent to limit the scope of Section 2314 (Pet. App. B7-B9).[6] On the contrary, it found evidence in the 1982 amendments supporting the application of Section 2314 to transportation of copies of unauthorized copyrighted material (Pet. App. B8). The court of appeals concluded further that interpretation of the copyright statute as an implied repeal of Section 2314 in a case like this one would violate the "cardinal principle of construction that repeals by implication are not favored" (Pet. App. B8).

ARGUMENT

Petitioners contend (Pet. 6-11) that the court of appeals' holding that transportation of unauthorized videotapes may constitute a violation of 18 U.S.C. 2314 conflicts with the Fifth Circuit's decision in *United States* v. *Smith*, 686 F.2d 234 (1982). In fact, there is no irreconcilable conflict between *Smith* and this case. Moreover, within the past year this Court denied certiorari in a similar case (which

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[6]The Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 *et seq.*, amended 17 U.S.C. 506(a) and 18 U.S.C. 2318 and added 18 U.S.C. 2319. These amendments, which increased the penalties for willful copyright infringement, did not become effective until May 24, 1982, after the commission of the offenses charged in the indictment. Petitioners were charged and sentenced under the prior version of 17 U.S.C. 506(a).

also arose out of the FBI's Miami-based investigation) raising the same issue. See *Gottesman* v. *United States*, No. 82-5852 (Feb. 28, 1983).

1. This case involves a significantly different factual situation from that in *Smith*. In *Smith* the defendant had videotaped television programs "off the air" (*i.e.*, from broadcast signals) and had produced and leased multiple copies of the videotaped material. The court held that such conduct did not constitute interstate transportation of stolen property in violation of 18 U.S.C. 2314, since, in the court's view, a copyright could not constitute "goods, wares, [or] merchandise" and copyright infringement could not be regarded as the equivalent of stealing, converting, or taking by fraud within the meaning of the statute (686 F.2d at 241).

Here, in contrast to *Smith*, there was an initial taking of a tangible item (a master tape) from its owner or custodian and a transfer of magnetic information from that tangible item to another (the videotape cassettes shipped to the agents). Early in the scheme, petitioner Bernstene told Agent Livingston that Al Nunes and co-defendant Avers were his sources of pirated movies (ER 7, 29, 31, 37-38). At the January 23 meeting, Bernstene stated that he was still receiving movie "masters" from Nunes, but was also investigating a potential source "in the valley," a collector who had a large library of motion pictures (ER 57-58, 65, 68-69, 70-72). At the end of May, petitioner Bernstene told one of the agents that his new source for motion picture masters was someone from a movie studio (ER 350). When Agent Livingston met petitioner Belmont, petitioner Bernstene introduced him as his "source" of major motion pictures (ER 871). Belmont admitted that he had several sources of motion picture masters, one of whom delivered movies to theaters in the Los Angeles area (ER 876). A search of Belmont's business revealed recorders capable of making

multiple cassettes from master tapes (ER 1115). This evidence clearly indicates that the pirated cassettes were made from master tapes, rather than recorded "off the air."[7] The court in *Smith* acknowledged that such a situation would be distinguishable from the case before it. See 686 F.2d at 243-244 n.17. Thus, whatever the merits of *Smith*,[8] there is no irreconcilable conflict between *Smith* and the present case.

Even if there were a conflict between *Smith* and this case on the issue of the application of 18 U.S.C. 2314 to copyright infringing activity, that conflict would be of considerably diminished significance as a result of the passage of the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 *et seq.*, codified at 17 U.S.C. 506(a) and 18 U.S.C. 2318, 2319. The new statute provides for felony treatment for more serious cases of copyright infringement involving audiovisual materials and trafficking in counterfeit labels, while prior law provided only for

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[7]The court of appeals' statement that the copying in this case was "off the air" (Pet. App. B6) appears to be without foundation in the record and may reflect some misunderstanding of that term. Petitioners did not contend in their brief to the court of appeals that *Smith* governed because they had taped the cassettes "off the air." The bald statement of petitioners' counsel on rebuttal at oral argument before the court of appeals was the first time petitioners claimed that their source of copyrighted materials was a broadcast signal, rather than movie masters misappropriated from a lawful owner or custodian.

[8]The court in *Smith* rejected or distinguished a number of cases in which federal courts have concluded that unauthorized taking of various forms of intangible property could form the basis for a violation of 18 U.S.C. 2314. See, *e.g.*, *United States* v. *Berkwitt*, 619 F.2d 649 (7th Cir. 1980); *United States* v. *Whetzel*, 589 F.2d 707 (D.C. Cir. 1978); *United States* v. *Atherton*, 561 F.2d 747 (9th Cir. 1977); *United States* v. *Drebin*, 557 F.2d 1316 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978); *United States* v. *Sam Goody, Inc.*, 506 F. Supp. 380 (E.D.N.Y. 1981). Moreover, the court in *Smith* rested its analysis on definitions of the statutory terms that appear to be unduly narrow. However, these points need not be considered here, because, as noted in the text, *Smith* is clearly distinguishable from the case at hand on its facts.

misdemeanor treatment for first offenses under the copyright infringement statutes. In view of the increased penalties provided under the new statute, prosecutors are likely to have less occasion to invoke 18 U.S.C. 2314 in connection with copyright infringing activity.

2. To the extent petitioners may contend that their conduct is outside the reach of Section 2314 because the essential magnetic signals constituting a movie are transferred from one tangible item (the master tape) to a different tangible item (the videotape cassettes), that contention is incorrect. In *United States* v. *Bottone*, 365 F.2d 389 (2d Cir.), cert. denied, 385 U.S. 974 (1966), the court considered a case in which documents had been removed from a company's files, copied, and returned to the files. Judge Friendly, writing for the court, rejected the argument that interstate transportation of the copies would not constitute a violation of 18 U.S.C. 2314 on the theory that the copies would not be "goods" that were "stolen, converted or taken by fraud." He stated that "when the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial" (365 F.2d at 393-394). Likewise, in the present case, the transfer of magnetic signals from one tape to another does not remove petitioners' actions from the scope of the statute.

Nor do the 1982 Piracy and Counterfeiting Amendments indicate that activities involving copyright infringement may be prosecuted only under the copyright laws. Those amendments provide expressly that the penalties for copyright infringement "shall be in addition to any other provisions of title 17 or any other law." 18 U.S.C. 2319(a). That provision makes clear that the 1982 amendments did not implicitly repeal Section 2314 as it is applied to the interstate transportation of pirated movies. See also, *e.g.*, *United*

States v. *Batchelder*, 442 U.S. 114, 122 (1979) (legislative intent to repeal must be manifest in positive repugnancy between provisions).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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